92-335

NO. _____

FILED
AUG 20 1992

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

RICHARD COLE LEIGHTON,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT
OF CRIMINAL APPEALS OF ALABAMA

APPENDIX TO THE PETITION

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III*
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:

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APPENDIX A

ORDER AND FINDINGS OF THE CIRCUIT COURT

OF CHEROKEE COUNTY, ALABAMA

[RECORD PAGES 32-33]

ORDER

The Defendant has moved the Court to dismiss the indictment in this case under the authority of Grady v. Corbin, 109 L.Ed.2d, 548 (199), which holds that the Double Jeopardy Clause of the United States Constitution bars a subsequent prosecution, if, to establish an essential element of the offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the Defendant has already been prosecuted. In the instant case, the Defendant is charged with the offense of Possession of a Firearm after conviction of a felony. The Defendant contends that this prosecution is barred because he was tried and convicted in the City Court of Centre, Alabama, for Possession of a Firearm Without a Permit.

Under Corbin, supra., the conduct which constitutes an offense in the first prosecution, must be embraced within the subsequent prosecution before the first case constitutes a bar to the second.

The State contends that possession of a firearm above is not criminal conduct and that, therefore the possession of the firearm is not "conduct that constitutes an offense" for which the Defendant has already been prosecuted.

This Court finds, however, that because the Defendant had been previously convicted of a felony he was not eligible to obtain a permit. Therefore, possession of a firearm alone is a criminal act for one who has been preciously convicted. Consequently, Possession of a Firearm constitutes a criminal offense, and in this case it is a criminal offense for which the Defendant has already been prosecuted.

This Court is of the opinion that the instant case is barred under the Double Jeopardy Clause of the United States Constitution, and, accordingly, it is,

ORDERED that this case shall be, and is hereby dismissed under the authority of Grady v. Corbin, 109 L.Ed.2d 548 (1990).

DONE this 26 day of November, 1990.

/s/ DAVID A. RAINS
DAVID A. RAINS, CIRCUIT JUDGE

Copies to:

Mr. Richard Igou
District Attorney
Dekalb County Courthouse
Fort Payne, AL 35967

Mr. Bert Latham
Assistant District Attorney
Courthouse Annex
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Mr. Gary Davis
Attorney at Law
P. O. Box 126
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APPENDIX B

[RELEASED: June 14, 1991]

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

JUDICIAL BUILDING, 445 DEXTER AVENUE

MONTGOMERY 36130

JOHN PATTERSON

Presiding Judge — Clerk's office

JOHN C. TYSON, III — (205) 242-4590

WILLIAM M. BOWEN, JR

SAM TAYLOR

H. WARD MCMILLAN

Judges

CR-90-328 Cherokee Circuit Court CC-90-158

State v. Richard Cole Leighton

AFFIRMED BY MEMORANDUM.

The argument of the appellant that the trial court erred in dismissing the

indictment because the appellee failed to raise the defense of double jeopardy at arraignment is without merit. The trial court had the discretion under Rule 16.3(b), A.R.Cr.P. (Temp.), to extend the time for the filing of the appellee's defense motion and was not required to set out its reasons for so doing. The court also had the discretion under Rule 16.2 to grant the appellee relief from waiver due to the delayed filing.

The argument of the appellant that the trial court erred in dismissing the indictment for possession of a pistol after a crime of violence because it was not barred by the appellee's previous conviction of possession of a pistol without a permit is without merit. The appellee is a convicted murdered who cannot legally obtain a pistol permit and for

whom, therefore, the mere possession of a pistol constitutes both crimes. Grady v. Corbin, 495 U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) prohibits a subsequent prosecution if to establish an essential element, the prosecutors will prove conduct that constituted a previoulsy prosecuted offense.

ALL THE JUDGES CONCUR

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

JUDICIAL BUILDING, 445 DEXTER AVENUE

MONTGOMERY 36130

JOHN PATTERSON
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
SAM TAYLOR
H. WARD McMILLAN
Judges

Clerk's Office
(205) 242-4590

Court of Criminal Appeals No. 90-328
(Cherokee Circuit Court No. 90-158)

State of Alabama vs. Richard Cole Leighton
Appellant Appellee

Dear Sir or Madam:

You are hereby notified that on August 23, 1991, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing overruled. Rule 39(k) motion denied. No opinion.

/s/LANE W. MANN
CLERK
COURT OF CRIMINAL
APPEALS

lwm:kl

Hon. A. Richard Igou
District Attorney
County Courthouse
Fort Payne, AL 35967

Hon. Joseph G. L. Marston, II
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11 South Union Street
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Hon. Gary Davis
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Centre, AL 35960

APPENDIX C

THE STATE OF ALABAMA----JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
May 29, 1991

19001818

Ex parte State of Alabama
PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS

(Re: State v. Richard Cole Leighton)

(CCA 90-328 (Cherokee CC-90-158)

CERTIFICATE OF JUDGMENT

WHEREAS, On December 2, 1991, a Writ of Certiorari to the Court of Criminal Appeals was granted by this Court, and the cause was set down for submission pursuant to Rule 39, Alabama Rules of Appellate Procedure,

WHEREAS, come the parties and the Petition for Writ of Certiorari being submitted and duly examined and understood by the Court, it is considered by the Court that the writ heretofore issued should be quashed and that the petition should be denied.

IT IS, THEREFORE, CONSIDERED AND ORDERED that the Writ of Certiorari heretofore issued to the Court of Criminal Appeals be, and the same is hereby, denied. NO COSTS TAXED. NO OPINION.

ADAMS, J. - Hornsby, CJ., Almon, Steagall and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said court. Witness my hand this 29th day of May, 1992.

/s/Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX D

ORDINANCE OF CENTRE

ORDINANCE NO. 111

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CENTRE, ALABAMA AS FOLLOWS:

Section 1. Any person or corporation committing an offense within the corporate limits of the City of Centre, ALabama, or within the police jurisdiction thereof, which is declared by a law or laws of the State of Alabama now existing or hereafter enacted to be a misdemeanor, shall be guilty of an offense against the City of Centre, Alabama.

Section 2. Any person or corporation committing an offense within the corporate limits of the City of Centre, Alabama, or within the police jurisdiction thereof, which is declared by a law or laws of the State of Alabama now existing or hereafter enacted to be a violation, shall be guilty of an offense against the City of Centre, Alabama.

Section 3. Any person or corporation committing within the corporate limits of the City of Centre, Alabama, or within the police jurisdiction thereof, an offense as defined by Section 13A-1-2 of the Alabama Criminal Code, which offense is not declared by a law or laws of the State of Alabama now existing or hereafter enacted to be a felony, misdemeanor or

violation, shall be guilty of an offense against the City of Centre, Alabama.

Section 4. Any person found to be in violation of Sections One (1), Two (2) or Three (3) of this ordinance shall, upon conviction, be punished by a fine of not less than One Dollar ($1.00) nor more than Five Hundred Dollars ($500.00) and/or may be imprisoned or sentenced to hard labor for the city for a period not exceeding six (6) months, at the discretion of the Court trying the case, unless otherwise provided by Section 5 of this ordinance. Any corporation found to be in violation of Sections One (1), Two (2) or Three (3) of this ordinance shall, upon conviction, be punished by a fine of not less than One Dollar ($1.00 nor more than Five Hundred Dollars ($500.00), at the discretion of the

Court trying the case.

Section 5. Any person found to be in violation of Section 32-5A-191, Code of Alabama, 1975, as amended, shall, upon conviction, be punished by a fine of not more than Five Thousand Dollars ($5,000.00) and/or may be imprisoned or sentenced to hard labor for not more than one year.

Section 6. Any ordinance heretofore adopted by the City Council of the City of Centre, Alabama, which is in conflict with this ordinance is hereby repealed to the extent of such conflict.

Section 7. If any part, section or subdivision of this ordinance shall be held unconstitutional or invalid for any reason, such holding shall not be construed to invalidate or impair the remainder of

this ordinance, which shall continue in full force and effect notwithstanding such holding.

Section 8. This ordinance shall become effective on

August 10, 1983.

ADOPTED AND APPROVED THIS THE 9th DAY of August, 1983.

ATTEST: /s/ ED YARBROUGH
ED YARBROUGH, MAYOR

/s/ JERRY D. O'NEAL
JERRY D. O'NEAL, CITY CLERK

APPENDIX E

RELEVANT ALABAMA STATUTES

Code of Alabama, 1975:

TITLE 13A, §13A-11-70. DEFINITIONS.

For the purpose of this division, the following terms shall have the respective meanings ascribed by this section:

(1) PISTOL. Any firearm with a barrell less that 12 inches in length.

(2) CRIME OF VIOLENCE. Any of the following crimes or an attempt to commit any of them, namely, murder, manslaughter, (except manslaughter arising out of the operation of a vehicle), rape, mayhem, assault with intent to rob, assault with intent to ravish, assault with intent to murder, robbery, burglary, kidnapping and larceny.

(3) PERSON. Such term includes any firm partnership, association or corporation.

§13A-11-72. CERTAIN PERSONS FORBIDDEN TO POSSESS PISTOL.

(a) No person who has been convicted in this state or elsewhere of committing or attempting to commit a crime of violence shall own a pistol or have one in his possession or under his control.

(b) No person who is a drug addict or an habitual drunkard shall own a pistol or have one in his possession or under his control.

§13A-11-73. LICENSE TO CARRY A PISTOL IN VEHICLE OR CONCEALED ON PERSON -- REQUIRED.

No person shall carry a pistol in any vehicle or concealed on or about his person, except on his land, in his own abode or fixed place of business, without a license therefor as hereinafter provided.

0564D